Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTOPHER GREGORY,

Petitioner,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, LEE H. LYTTON, JR., BISHOP THOMAS J. DRURY, ELENA S. KENEDY, B. R. GOLDAPP, KENNETH ODEN AND ALICE NATIONAL BANK, INDEPENDENT EXECUTOR OF THE ESTATE OF SARITA K. EAST, DECEASED, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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May 21, 1981

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Ecclesiastical rules of the Roman Catholic Church were not involved in the decisions and judgments of the courts of the State of Texas and the record in this case reflects that the Texas courts relied only upon applicable principles of Texas law in reaching their decisions.

2. The record in the case clearly reflects that Petitioner was afforded a trial upon the issues raised by the pleadings then before the court, and Petitioner failed to demonstrate that he was entitled to a jury at such trial under Texas laws and procedures.

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Opinions Below

The Judgment of the Supreme Court of Texas refusing Petitioner's application for a writ of error, which was without opinion and is not reported, is set forth at A-47.* The opinion of the Texas Court of Civil Appeals is reported at 604 S.W. 2d 402 (Tex. Civ. App. — San Antonio 1980, writ ref'd. n.r.e.) (A-34-

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*The appendix to the petition is abbreviated throughout this brief as "A- ".

38). The Judgment of the trial court was rendered without opinion (A-24-33).

Counter-Statement of the Case

History of this case

During her lifetime, Mrs. Sarita K. East, a Texas resident, caused to be incorporated under the Texas Non-Profit Corporation Act, The John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member, but in February, 1960, she appointed Jacob S. Floyd and Lee H. Lytton, Jr., both residents of the State of Texas, as co-members of such Foundation. Sometime thereafter she requested and received their resignations as members. In December 1960, Mrs. East appointed Petitioner, a Trappist monk based in Spencer, Massachusetts, as a co-member. The Will of Sarita K. East, dated January 22. 1960, left the residue of her estate to her Foundation. A First Codicil to said Will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi, Texas, as her successor to membership in such Foundation upon her death. Thereafter, from time to time, Mrs. East made additional codicils to such Will, and under the Third Codicil, she revoked the First Codicil which named the Corpus Christi Bishop, and appointed Petitioner, Peter Grace and Father Patrick J. Peyton as successor-members to her after her death.

In February 1961, Mrs. East died in New York City and, thereafter, in April 1961, Lytton (later joined by Floyd) filed this suit against Peter Grace, Father Peyton, Thomas Doyle and J. J. Meehan, all residents of the State of New York, the Foundation and Petitioner. The Attorney General of Texas was later joined in the suit as an indispensable party. Lytton and Floyd alleged generally that their respective resignations as members of the Foundation were obtained as a result of undue influence exerted upon Mrs. East by Petitioner, et al, and that the revocation of the First Codicil appointing the Corpus Christi

Bishop and the December 1960 appointment of Petitioner as a member of the Foundation were also procured as a result of undue influence practiced upon Mrs. East by Petitioner, et al.

Thereafter, a contest of the Will and Codicils of Mrs. East was filed by her heirs-at-law on July 25, 1962. While the will contest was pending, under date of October 28, 1963, a settlement agreement was fully executed in this case and on September 1, 1964, an agreed interlocutory judgment (A-1) was entered by the court upon such settlement agreement.

Some one and one-half years after the entry of the Judgment, Petitioner gave to the trial court his first notice of his claim of non-consent by the filing of his Application for Bill of Review on March 8, 1966, seeking to set aside the agreed Judgment. The Bill of Review was dismissed and the Court of Civil Appeals affirmed. (A-38-47) Thereafter, Petitioner filed his motion in this cause on August 1, 1968, to set aside such agreed Judgment.

Subsequently, in the year 1978, the will contest was terminated[1] and except for the pendency of Petitioner's motion to set aside the agreed Judgment, the time had come for the trial court to make such Judgment a final one. Therefore, on July 24, 1979, the Attorney General of Texas, et al filed a motion for the Entry of Final Judgment and to Dismiss Petitioner's Motion to Set Aside the Interlocutory Judgment. A trial upon that motion, held on September 1, 1979, resulted in Final Judgment making the interlocutory judgment final and dismissing Petitioner's motion to set aside the interlocutory judgment. (A-24)

At the trial court level, Petitioner essentially took the position that even though he had signed the settlement agreement and agreed interlocutory judgment, yet he did not consent at the time of the hearing to the entry of Final Judgment, and, therefore, such Judgment could not be made final. On appeal, the Texas Court of Civil Appeals held that the evidence conclusively

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[1] Trevino, et al v. Turcotte, et al, 564 S.W. 2d 682 (Tex. Sup.)

established that Petitioner signed the settlement agreement and that the Judge had no reason to know of any dissatisfaction which Petitioner might have had with the agreement at the time the interlocutory judgment was rendered and that since the trial court had no knowledge of any lack of consent prior to entry of the interlocutory order, Petitioner could not prevent final judgment by attempting to later withdraw his consent. In connection with Petitioner's claim of conditional delivery of the settlement agreement and agreed Judgment, the Court of Civil Appeals noted that "neither the Appellant's (Petitioner's) attorneys, the attorneys for the Appellees, the trial Judge, nor any of the other parties to the suit knew of the conditional nature of his consent until several months after the Judgment was rendered." (A-34) The Supreme Court of Texas refused to review the decision of the Court of Civil Appeals. (A-47)

Reasons for Denying the Writ

1.

NO FEDERAL QUESTIONS WERE PRESENTED TO THE TEXAS COURTS FOR DETERMINATION AND THE TEXAS COURTS RELIED ONLY UPON APPLICABLE PRINCIPLES OF TEXAS LAW IN REACHING THEIR DECISIONS.

It is not true, as stated by Petitioner, that the interlocutory judgment of 1964 was "necessarily based solely on Keating's asserted ecclesiastical right to act on behalf of Gregory." The undisputed facts are that in the month of April 1961, the Houston, Texas law firm of Baker & Botts (Messrs. Robert K. Jewett and Denman Moody) were retained to represent Petitioner, Peter Grace, Father Peyton, Tom Doyle, Jack Meehan and the Foundation. An agreement for the settlement of the case was reached in August of 1963, and each of the clients represented by Baker & Botts (including Petitioner) consented in writing by affixing their signatures to the settlement agreement and agreed Judgment. Petitioner signed both documents as "Christopher

Gregory", and under that name appeared "Christopher Gregory, Sometimes Known as Brother Leo, OCSO, Defendant and Cross-Defendant, Acting Individually and as a Religious of the Cistercian Order of the Strict Observance Under Valid Authority of His Lawful Religious Superior". The documents signed by Petitioner, Grace, Doyle, Meehan and Father Peyton were transmitted to Baker & Botts and received by them on October 9, 1963; whereupon, Baker & Botts presented the agreement to Mr. Kenneth Oden as the representative of Lytton and Floyd on October 10, 1963, and Mr. Oden undertook to present it to his clients for their signatures. The settlement agreement and Judgment were then signed by the Texas Group and the last person to sign was Mr. Zuber, Assistant Attorney General of Texas, and he signed on October 28, 1963.

Thereafter, on September 1, 1964, the settlement agreement was presented to the trial court for approval and entry of Judgment thereon. Mr. Jewett was acting as a member of his firm, Baker & Botts, in the entry of the Judgment which was provided for in the settlement agreement. Therefore, Mr. Jewett acted upon the terms and provisions of the signed settlement agreement and agreed Judgment which were delivered to him for obvious implementation, and with that authority from Petitioner, his attorney, Mr. Jewett, satisfied the requirements of the settlement agreement with respect to the membership of the Foundation and all other provisions of the settlement agreement. Certain corporate proceedings were to take place in open court incident to the implementation of the Judgment, and Mr. Jewett acted in carrying out in open court those corporate proceedings. Mr. Jewett obtained a proxy from Grace and he received an authorization from Petitioner's Abbot, Thomas Keating, to act for Petitioner in carrying out the corporate proceedings. (A-49) Mr. Jewett had been advised that further authority to act for Petitioner in implementing the settlement and Judgment would be sent to him, and Mr. Jewett did thereafter receive a letter dated July 9, 1964, signed by Petitioner and addressed to his

Abbot. This letter from Petitioner to his Abbot granted to the Abbot full power and authority to act for Petitioner in the premises and constituted the Abbot an attorney-in-fact for Petitioner.[2]

The power of attorney from Petitioner to the Abbot constituting the Abbot as Petitioner's attorney-in-fact and the telex from the Abbot as Petitioner's attorney-in-fact to Mr. Jewett to act as Leo's proxy were additional authority even over and above the settlement agreement and the accompanying Judgment, both signed by Petitioner. These transactions under Texas law constitute the requisite agency and proxy for the entry of the agreed Judgment. *Merriman* v. *Fulton, Hensley & Cross,* 29 Tex. 97 (Tex. Sup., 1862); *Halff* v. *O'Connor,* 37 S.W. 238 (Tex. Civ. App., 1896 writ ref'd.); *Southern Rock Island Plow Co.* v. *Williams,* 80 S.W. 2d 340 (Tex. Civ. App., Amarillo, 1934, writ dism.); *Townsend & Co.* v. *South Plains Monument Co.,* 257 S.W. 648 (Tex. Civ. App., Amarillo, 1924, n.w.h.); Article 1396 2.13 V.A.T.S.; 3 Am. Jur. 2d 434, Sec. 25, Sec. 91; 3 Tex. Jur. 3d, Sec. 46, Agency by Estoppel, p. 76 and Secs. 47-51.

There is no evidence in the record that ecclesiastical rules were considered or even mentioned in connection with the trial of this case. Moreover, the decisions of the Texas courts turned upon principles of Texas law, and there is no federal question presented.

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[2] The July 9, 1964 letter from Petitioner to Abbot Keating read in pertinent part as follows:

"Reverend Father: Aware that what I am today signing may be at any time used by the person to whom it is addressed in any manner that he in conscience may see fit, I wish to make the following carefully worded but unequivocal statement. . . .

"In the present situation I accept the decision of events in the light of the above, without condition and thus I shall initiate no further action whatsoever concerning the Kenedy Memorial Foundation. The word 'initiate' does not preclude my cooperating in such actions as my superiors may judge to be necessary for the finalizing of the settlement already agreed upon." (Exhibit 3 in evidence).

2.

PETITIONER WAS AFFORDED A TRIAL UPON THE ISSUES AND PLEADINGS THEN BEFORE THE COURT, AND HE FAILED TO DEMONSTRATE ENTITLEMENT TO JURY TRIAL UNDER TEXAS LAW. NO FEDERAL QUESTION IS INVOLVED.

Petitioner had on file a motion to set aside the settlement agreement and agreed interlocutory judgment, alleging several reasons in support of his motion. The Attorney General, joined by other Respondents, filed a motion to dismiss Petitioner's motion and to make the interlocutory judgment a final one. Thus, the issue was joined on all grounds contained in Petitioner's motion as well as on all grounds contained in the motion of the Attorney General, et al. Petitioner, through his attorneys' objections, attempted to unilaterally limit the scope of the hearing to whether or not Petitioner then consented to the settlement agreement and interlocutory judgment. The trial court consistently overruled those objections. The scope of the trial was delineated by the issues framed by the pleadings then before the court, and evidence was admitted upon all such issues. Petitioner was afforded a full and complete trial upon all issues raised by his motion and upon all issues raised by the motion filed by the Attorney General. If Petitioner elected at trial time to stand upon an erroneous principle of law, i.e. that the only issue was whether Petitioner at that time consented to the settlement agreement and interlocutory judgment, then, he has no legitimate complaint to make, and certainly no federal question is inherent in the point.

Therefore, Petitioner was afforded a full and complete trial upon his issues as well as the issues raised by the motion of the Attorney General, and no federal question is involved.

As related to Petitioner's claim of a denial of jury trial, the record discloses that Petitioner's demand for jury trial was not timely made and, moreover, Petitioner failed to request jury trial

or complain of the lack of a jury at the time of the trial on September 21, 1979.

The state is free to establish its own procedures and practices with regard to conduct of civil litigation in Texas courts, including the right to trial by jury. *Iacapondi* v. *New Amsterdam Casualty Company*, 258 F. Sup. 880, D.C. Pa., 1966; aff'd 379 F. 2d 311; certiorari denied in 88 S. Ct. 802, 389 U.S 1054, 19 L. Ed. 2d 849; *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, 427 S.W. 2d 344 (Tex. Civ. App., Dallas, 1968, no writ hist.)

Accordingly, the Texas courts have established their own procedures and practices in connection with the right to a jury trial in civil matters. Article I, Section 15 and Article V, Section 10 of the Texas Constitution, V.A.T.S., preserve and protect the right of any litigant in a civil case to be afforded a jury trial, provided however, that these Texas Constitutional provisions further empower the state legislature to enact such statutes as are necessary to regulate the right to trial by jury.

The Texas Rules of Civil Procedure have been promulgated as the rules governing the trial of civil cases in all Texas courts. Rule 216 et seq., of these Rules of Civil Procedure specifically prescribe the provisions related to the right to a jury trial.[3]

The right to trial by jury in Texas is not an absolute right in civil cases, but rather, it is subject to certain procedural rules, such as Rule 216 of the Texas Rules of Civil Procedure. *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, supra.

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[3] Rule 216 provides that "No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance."

Even though the provisions of Rule 216 have been held to be discretionary rather than mandatory in their application, the Texas courts have consistently held that when Rule 216 has not been complied with, a trial court's decision to grant or deny a jury trial will not be reversed on appeal except on a showing of abuse of discretion by the trial court. It is and was a burden on appeal for the Petitioner to show an abuse of such discretion. *Childs* v. *Reunion Bank,* 587 S.W. 2d 466, (Tex. Civ. App., Dallas, 1979, writ ref'd. n.r.e.); *Arnoff* v. *Texas Turnpike Authority,* 299 S.W. 2d 342 (Tex. Civ. App., Dallas, 1957, no writ hist.); *Wooten* v. *Dallas Hunting & Fishing Club, Inc.,* supra. The abuse of discretion, if any, must be shown and must be "apparent on the face of the record." *Ramsey* v. *Dunlop,* 205 S.W. 2d 979 (Tex. S. Ct., 1947); *Hernandez* v. *Light Publishing Company,* 245 S.W. 2d 553 (Tex. Civ. App., San Antonio, 1952, writ ref'd.) The record in this case is completely void of any showing of an abuse of discretion by the trial court. Since there is nothing in the record to show any of the circumstances surrounding the jury request except that it was untimely made, no error and no abuse of discretion was shown by Petitioner. *Lebman* v. *Sullivan,* 198 S.W. 2d 280 (Tex. Civ. App., San Antonio, 1946, writ ref'd n.r.e.); *Arnoff* v. *Texas Turnpike Authority,* supra.

By failing to press his jury demand at trial, Petitioner waived his untimely jury demand and consented to a non-jury trial of the issues before the court. *Hernandez* v. *Light Publishing Company,* supra; *Richardson* v. *Raby,* 376 S.W. 2d 422 (Tex. Civ. App., Tyler, 1964, no writ hist.); *Huddleston* v. *Western National Bank,* 577 S.W. 2d 788 (Tex. Civ. App., Amarillo, 1979, writ ref'd. n.r.e.).

The record in this case does not present any federal question regarding the denial of the right to a trial by jury.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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